United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2180

B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

v.

Docket No.
74-2180

P/S

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, NATIONAL BANK OF NORTH AMERICA, DASHA AUERBACH STUART, Executrix under Last Will and Testament of Josef Auerbach, IRVING GEIST, KENNETH DEMBSKI, ROYAL S. MARKS, SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR., ALICE HECHT, MARY ELLEN HECHT AND HENRY HECHT, JR.,

Defendants,

and

ROBERT B. SCHINDLER, As Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt,

Intervenor-
Appellant.

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BRIEF OF INTERVENOR-APPELLANT

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STATEMENT OF CASE

This Interpleader action has been commenced under 28 U.S.C.A. §1335 on May 12, 1970. Plaintiff has deposited with the Registry of the District Court $166,122.16 representing the proceeds of renewal commissions through January 1, 1973 of one of their former general agent's, Lawrence E. Simon, a defendant herein. The renewal commissions will continue to accrue after that date and have been made the subject of this action as well. In addition, plaintiff has deposited $131,437.23 representing "Floor Plan Payments" credited to Simon's account with plaintiff as of January 1, 1973. The floor plan payments are likewise accruing since January 1, 1973 and have also been made the subject of this action.

The appellant-intervenor is the trustee in bankruptcy of Lawrence E. Simon (appellant will hereinafter be referred to as the "trustee"). The principal defendant-appellees are Lawrence E. Simon (hereinafter referred to as "Simon"); Third National Bank of Hampden County (hereinafter referred to as "Third National" or the "Bank") and Dasha Auerbach Stuart, Executrix under the Last Will and Testament of Josef Auerbach (hereinafter referred to as "Stuart"). There are, in addition, other defendants who have either defaulted herein or their rights have been disposed of below in a manner satisfactory to the trustee. This brief will therefore discuss the trustee's rights as compared with the

rights of Third National, Stuart and Simon to the funds subject to disposition in this action. A trial of the issues took place on April 26 and 27, 1973 before the Honorable Marvin E. Frankel, United States District Judge, who thereupon referred the matter to the Honorable Gerard L. Goettel to hear and report as Special Master. Hearings thereafter took place on September 21 and 25, 1973 before the Special Master. This appeal is from a judgment entered herein on July 29, 1974. The judgment was founded upon the report and supplemental report of the Special Master dated January 30 and March 11, 1974, respectively (record #116 and 117) and the decision of Judge Frankel of July 3, 1974 adopting the Special Master's report. The trustee will show that the said judgment should be reversed and the funds on deposit as set forth above be awarded to the trustee.

STATE OF FACTS

Simon became a general agent for Mass Mutual upon the execution of a general agent's agreement on July 31, 1932 (Stipulation of Fact 15, record #127). On November 10, 1938 Simon entered into a loan agrement with Third National and as security for loans Simon executed an assignment of his renewal commissions. Thereafter Simon had a running loan account with Third National. On December 31, 1962 Simon's general agency agreement terminated and on September 16,

1964 Simon and Mass Mutual entered into a "Floor Plan Agreement" (Stipulation of Fact 15, record #127). On June 17, 1963 Simon owed Third National $309,000.00 and on that date he executed a note in that sum payable on July 17, 1963 (Trustee's Exh. L, S.M. 4/26/73, record #115). The note was never paid and on March 15, 1967 Third National wrote to Mass Mutual that the balance due on the note as of September 2, 1966 was $160,242.37 (Trustee's Exh. L, S.M. 4/26/73 p. 184, record #115). Third National demanded in this letter that in accordance with the terms of Simon's assignment, Mass Mutual remit to it all commissions as they became due. From March 1967 through December, 1967, Mass Mutual remitted Simon's renewal commissions to Third National(S.M. 4/27/73, p. 171, record #115; S.M. 9/21/73, p. 43, record #149). Beginning in January, 1968, however, the renewal commissions were escrowed by Mass Mutual (S.M. 4/27/73, p. 174, record #115). Payments to Third National were stopped and renewal commissions escrowed because Mass Mutual had been served with a restraining notice by one of Simon's judgment creditors, Irving Geist who had recovered a judgment for $41,620. On January 15, 1968, Mass Mutual wrote to Third National (Trustee's Exh. S, S.M. 4/27/73, p.203, record #115), advising Third National of the Geist restraining notice. Mass Mutual informed Third National that unless the restraining notice was lifted before January 29, 1968, the next date on which payment would ordinarily be made to Third National, it

would be necessary for Mass Mutual to escrow the renewal commissions. In December, 1967 Simon contacted Third National and asked for an additional loan of $8,400. to "meet some hospital expenses right now (S.M. 9/21/73 p. 137, Record # 149). The loan was made. On January 19, 1968, Mass Mutual was served with an execution and Sheriff's levy on behalf of Stuart on her $71,000. judgment (Stipulation of Fact No. 19 and 20, record #127). On January 25, 1968, Mass Mutual wrote to the attorneys for Third National (Trustee's Exh. Q, S.M. 4/27/73, p. 201, record #115) and advised them of the service of the Stuart levy. On February 19, 1968, Third National's attorneys wrote to Mass Mutual (Trustee's Exh. Y, S.M. 4/27/73, p.221, record #115) and demanded payment of the escrow funds and informed Mass Mutual that if this was not done, suit would be insituted. On February 20, 1968 (Trustee's Exh. X, S.M. 4/27/73, p. 219, record #115), the Assistant General Counsel of Mass Mutual met with the cashier of Third National and its counsel and discussed the entire matter of Simon's debt and the outstanding judgments. On May 9, 1969, Mass Mutual wrote to the cashier of Third National (Trustee's Exh. V, S.M. 4/27/73, p.215, record #115) and informed Third National that Mass Mutual, on the basis of the indebtedness to it by Simon, had offset the sum of $19,278.75 against Simon's escrowed renewal commissions.

On May 12, 1969 (Trustee's Exh. N and AG, S.M. 4/27/73 p. 193, record #115 and S.M. 9/21/73 p. 134, record #149), Simon, accompanied by his nephew, who was an accountant, met

at the Bank to discuss"the status of his affairs" with Mr. Brunel and Mr. Moekler of Third National and Mr. Bunten of Mass Mutual. As a result of this discussion, Third National determined that according to the present payment schedule value on the renewal premiums, there would be just enough to take care of Third National. Third National was informed by Simon that he was indebted to National Bank of North America $240,000.

In March of 1970 Simon had a telephone conversation with Thomas C. Platt, Esq., of the firm of attorneys representing Third National. During the conversation, Mr. Platt told Simon:

> Now, don't you go through any bankruptcy proceedings for the next four months. (S.M. 4/26/73 p. 79, record #115)

During this conversation Simon was told to sign the U.C.C.-1 financing form later used by the Bank to allegedly perfect its security interest. In response to this Simon said "Very well" and hung up (S.M. 4/26/73, p. 79, record #115). Barely four months after this conversation and four months and five days from the date of the filing of the U.C.C.-1 form on March 16, 1970 with the New York Department of State to allegedly perfect Third National's security interest, Simon filed his petition in bankruptcy on July 21, 1970. During all of the above times Simon's place of business was in the City, County and State of New York(S.M. 4/26/73, p. 66, record #115) and his permanent records with respect to the conduct of his business were maintained in New York(S.M. 4/26/73,

pp. 66-67, record #115). His permanent records consisted of the amounts of commissions due him from Mass Mutual and paid month by month, the amounts of insurance sold and the usual details concerning the policies that were sold by the salesmen(S.M. 4/26/73, p. 67, record #115). Simon's testimony (S.M. 4/26/73, pp. 23-37, record #115) of hopeless insolvency from at least 1968 to the filing of his petition in bankruptcy was irrefutable and overwhelming.

POINT I

UNDER MASSACHUSETTS LAW THE ASSIGNMENT TO THIRD NATIONAL BY SIMON OF HIS RIGHT TO FUTURE RENEWAL COMMISSIONS IS INVALID AGAINST THE TRUSTEE.

Third National contended below that the substantive law of Massachusetts is the applicable and governing law with respect to the validity and effect of its alleged security interest. With this contention as its premise, Third National contended that the assignment of Simon's rights in future renewal commissions is valid under Massachusetts law.

It is submitted that the Massachusetts authority which is dispositive of the question presented under this point heading is Taylor v. Barton Child Company, 228 Mass. 126, 117 N.E. 43 (1917) wherein the court held that an assignment of future accounts receivable given as security for the payment of certain promissory notes did not give the assignee a valid title to such accounts receivable against a trustee in bankruptcy.

In Claycraft Company v. John Bowen Co. et. al., 287 Mass. 255, 191 N.E. 403 (1934) relied upon by Third National, the Taylor case is cited and distinguished.

> The principles and spirit of our jurisprudence have been that owners of personal property ought not to acquire any false credit by creating incumbrances more or less secret and unknown to the world upon property of which they are to come into possession in the future as ostensible owners in absolute right.

The doctrine of the Taylor case was considered by the United States District Court, District of Massachusetts, in 1926 in In re Jenkins Corporation, 11 F.2d 979, and reaffirmed. At page 980, the court states:

> [T]he reasoning on which the opinion proceeds seems to me decisive against the claimant. The same result, but under the law of New York, was reached by the United States Supreme Court in Benedict v. Ratner, 45 S. Ct. 566, 268 U.S. 353, 69 L. Ed. 991. If the question be regarded as still open in spite of Taylor v. Barton Child Co., supra., I should reach the same conclusion. It would be extremely unfortunate if secret liens, nowhere a matter of record, could be imposed upon such an important species of property under modern conditions as accounts receivable, and for the reasons stated in Taylor v. Barton Child Co. I do not think that such a result is required by logic of the law.

Although the District Court in In re Robert Jenkins Corporation, supra, was reversed by the First Circuit Court of Appeals (17 F.2d 555), the soundness of the doctrine in the Taylor case was not questioned. The reversal being for other reasons.

As in the instant case, the assignment in Taylor was given as security for the payment of certain loans and was intended to cover present and future rights. Subsequent to the assignment the assignor was adjudicated a bankrupt. In Taylor the court noted that the assignor's "trustee in bankruptcy is defending this case" (p. 129 of 228 Mass.). In posing the question to be decided by it the court says, at p. 129:

> The crucial question is whether an assignment of book accounts, which are to come into existence in the future in connection with an established business, will be enforced in equity against a trustee in bankruptcy.

In answering this question in the negative, the court says, at p. 131:

> Practical difficulties of no small consequence would be encountered in the operation of the contrary doctrine. Assignments of book accounts do not require recording or any public act for their validity. . . Notice need not be given in order that they be valid against third persons. . . Merchants and manufacturers might well acquire a considerable credit upon the supposed strength of book accounts which later might turn out to have been assigned long before they came into exitence. A door would be opened for the accomplishment of fraud in business.

The court further states, at p. 131:

> Under the law of Massachusetts, a mortgage of after-acquired property is valid, although the mortgagor retains possession, and the mortgagee, who takes possession before rights of third parties have intervened and before the filing of a petition in bankruptcy, has a valid title to such property. (Emphasis supplied)

In In re Robert Jenkins Corporation, supra, the Circuit Court found that the assignee of future accounts receivable had taken possession of the assigned accounts before rights of third parties had intervened and before the filing of a petition in bankruptcy. In the instant case, Third National never took possession of the funds on deposit in the Registry of the court in the Interpleader action before rights of third parties had intervened and before the filing of Simon's bankruptcy petition. In fact, Third National has never received possession of the funds which are the subject of this Interpleader action. Beginning in January, 1968, Simon's renewal commissions were escrowed by Mass. Mutual (S.M. 4/27/73, p. 174).

The decision of the First Circuit Court of Appeals in In re Robert Jenkins Corporation, supra, is reviewed in 7 Boston University Law Review 286. This review is useful since it not only analyzes the Circuit Court's decision and the grounds therefore, but also discusses the underlying decision in the Taylor case.

The doctrine of the Taylor case has been reaffirmed by the United States District Court for the District of Massachusetts in In re Rice Chocolate Co., 36 F. Supp. 365, 367 (1941) and In re Markert, 45 F. Supp. 661, 663 (1942)

The rationale underlying Taylor is that the transaction there involved, as in the instant case, was inherently fraudulent, and was declared to be invalid against a trustee in bankruptcy under Massachusetts law. By virtue of §70e of the Bankruptcy Act, which will be discussed under a later point heading, the transaction is also fraudulent under the Federal Bankruptcy Act. In 2 Gilmore, Security Interests in Personal Property, p. 1291, it is said:

> However, as Justice Holmes noted [Moore v. Bay, 284 U.S. 52, 76 L.Ed. 133], the trustee's powers of avoidance under §70e cover claims voidable not only for want of record but "for other reasons". In its current form §70e specifically refers to transfers and obligations which are "fraudulent . . . or voidable for any reason by any creditor . . ." The entire law of fraudulent conveyances, decisional and statutory, state and federal thus comes into play. (Emphasis supplied)

The Special Master and Third National relied upon Claycraft Company v. John Bowen Co., et. al., supra; Citizens Loan Association v. Boston Maine Railroad, 196 Mass. 528, 82 N.E. 697(1907); Commercial Casualty Insurance Company of Newark v. Thomas D. Murphy et ano., 282 Mass. 100, 184 N.E. 434 (1933)

and Great American Indemnity Company v. Allied Freightways, Inc. et al, 325 Mass. 568, 91 N.E.2d 823 (1950) to support the contention that an assignment of future renewal commissions is valid against a trustee in bankruptcy.

Each one of the above cited cases is distinguishable from the instant case. In none of the four cases cited was a trustee in bankruptcy a party. The dispute in each case was between an assignee of future rights and a party other than a trustee in bankruptcy. In none of the cases cited was the court called upon to consider, nor did any court discuss the question of the validity of an assignment of future rights as against a trustee in bankruptcy.

In Citizens Loan Association v. Boston and Maine Railroad, supra, the trustee in bankruptcy was not a party to the action asserting his rights under the Bankruptcy Act. The only parties involved were the assignee and the bankrupt's employer who was holding the fund in dispute. In effect the only parties involved were the assignee and the bankrupt who had obtained his discharge. As the court stated at p. 530 of 196 Mass.:

> [T]he only question intended to be raised by the facts is whether the assignment of wages can be enforced after said bankruptcy proceedings and the discharge therein.

POINT II

EVEN IF THE ASSIGNMENT WAS VALID AGAINST THE TRUSTEE UNDER MASSACHUSETTS LAW, UPON THE ENACTMENT OF THE UNIFORM COMMERCIAL CODE IN NEW YORK ON SEPTEMBER 27, 1964, IT BECAME APPLICABLE IN DETERMINING WHETHER OR NOT THIRD NATIONAL PERFECTED ITS SECURITY INTEREST AGAINST THE TRUSTEE

Judge Frankel, in adopting the report of Special Master Goettle, held that the filing requirements of the New York Uniform Commercial Code were inapplicable because ". . . the pertinent records at the pertinent time were in Massachusetts." (Dec. July 3, 1974 p. 3). But mere pertinacy is not the test prescribed by the applicable statute. Section 9-103 (1) of the Massachusetts Uniform Commercail Code (Article 95B) is identical in language with its New York counterpart (with the inconsequential substitution of the word "title" for "article" in the Massachusetts version). The sections provide:

> If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of law rules) of the jurisdiction where such office is located. (Emphasis supplied)

The test is therefore not where the pertinent records are kept but ". . . where the assignor of accounts or contract rights keeps his records concerning them. . ." The test applied by the Special Master (Spec. Mast. rpt. January 30, 1974, p. 22)

state that:

> When dealing with renewal commissions . . . the pertinent records are those kept in Massachusetts concerning the receipt by the company of the renewal commission and the crediting of the commission to Simon's account. . . The operable act which vested the commission, the receipt of the premium by the company in Massachusetts, is not reflected in Simon's records.

But the evidence does not support the Special Master's analysis. Simon became a general agent of Mass Mutual on July 31, 1932 and continued as such until December 31, 1962 (Stipulation of Fact No. 15, record #127). During all that time his place of business was in the City, County and State of New York (S.M. 4/26/73, p.66, record #115). His permanent records with respect to the conduct of his business were maintained in New York (S.M. 4/26/73, pp. 66-67, record #115). His permanent records consisted of the amounts of commissions due him from Mass Mutual and paid month by month, the amounts of insurance sold, and the usual details concerning the policies that were sold by the salesmen (S.M. 4/26/73, p. 67, record #115). These were Simon's records and were kept in the City, County and State of New York. These records were still in New York at the time Simon filed his bankruptcy petition in July of 1970 (S.M. 9/21/73, p. 130, record #149). There is no evidence that Simon either maintained an office in Massachusetts or that he kept his personal records there. Although it is obvious that Mass Mutual would keep such records in their home

office in Massachusetts, those records would be the records of Mass Mutual and not Simon's personal records.

If the approach of the Special Master were to be adopted, Simon's then prospective creditors (the class sought to be protected by the filing requirements of the Uniform Commercial Code's Article 9) would be relegated to a hit or miss search of filing offices where Simon's debtors happened to maintain offices where they kept their records. If Simon were not an agent for only Mass Mutual but had given an assignment of his renewal commissions for many insurance companies that he represented having their offices all over the United States, the problem is glaringly obvious. This is recognized in the official comment to §9-103(1) of the Code which states, in this regard:

> If we bear in mind that one of the principal questions involved is where certain financing statements shall be filed, two things become clear. First: since the purpose of filing is to allow subsequent creditors of the debtor-assignor to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected. Second: since the validity of the assignment against third parties may depend on the filing of a financing statement in the proper place, it is vital that the place chosen be one which can be determined with the least possible risk of error. (Emphasis supplied).

This approach is recognized in 1 Gilmore, op. cit. §10.9 p. 321 offered by the trustee as precisely the situation in the instant case and as conclusive on this point:

> Litigation may of course arise in some other state: in this situation the court's solution of the choice of law problem may

> depend on whether or not Article 9 is also in force in the other state. If the other state is, like the record-keeping state, a Code state, then the §9-103 provision operates as a sort of waiver of jurisdiction by the other state in favor of the record-keeping state. With respect to the problem of perfection, for example, the other state would recognize filing in the record-keeping state as perfecting the security interest (thus giving a sort of extra-territorial effect to the filing) and would, on a parity of reasoning, give no effect to filing under its own statute. For example, assume an assignment of rights under a contract which is to be performed in State B. The records are keptin State A, where the contractor has an office, but all the other relevant contacts (execution and performance of the contract, payment and so on) are in State B. If both A and B are Code states, filing in State A would be the only way of perfecting the security interest in either state. (Emphasis supplied)

It is difficult to understand how the Special Master could have misread the quotation above (Spec. Mast. rpt. January 30, 1974, p.23, record # 116) so as to apply the filing requirements of the Massachusetts rather than the New York Uniform Commercial Code. In the instant case the records were kept in the"contractor's" (in our case the contractor is Simon) office in New York. Thus under §9-103(1) of both the New York and Massachusetts Uniform Commercial Code, the law of New York and its filing requirements are made exclusively applicable. See also Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc., 161 A2d 19 (1960) cited at 1 Gilmore, op. cit., p. 320.

POINT III

THIRD NATIONAL FAILED TO PERFECT ITS SECURITY INTEREST WITHIN THE TIME PROVIDED FOR IN §10-102 OF THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code took effect in New York State on September 27, 1964, §10-105 of the Code. The New York State Uniform Commercial Code applies to transactions entered into and events occurring on and after its effective date; to wit, September 27, 1964. §10-101 of the Code. Thus, with the exception about to be noted, the New York Code is not applicable to the security agreement relied on by Third National (Exhibit B attached to the complaint). That exception is to be found in §10-102 of the Code.

As the heading to §10-102 sets forth, it specifies those laws which were repealed by the enactment of the Code in this State (§10-102(1)) and makes provision for the transition of transactions validly entered into before September 27, 1964 (§10-102(2)).

Prior to the effective date of the Code, Third National's security interest required no filing, refiling or recording. The document dated November 10, 1938 was an assignment to Third National of monies to become due and payable under the contract therein described. No filing, refiling or recording was required under the laws of New York to perfect such a security interest. Thus §10-102(2)(c) is the controlling subdivision.

Third National's security interest covered a "Contract Right" as that term is defined in §9-106 of the Code. Thus the perfection of Third National's security interest continued until and lapsed 36 months after the Code took effect; that is, it continued in effect until and lapsed on September 27, 1967.

Third National first filed a U.C.C.-1 form of financing statement in the New York City Register's Office on February 20, 1970 and again filed a U.C.C.-1 form of financing statement in the same office on March 11, 1970. It first filed a U.C.C.-1 form of financing statement in the Office of the Department of State of the State of New York on February 25, 1970, and again filed a U.C.C.-1 form of financing statement in the same office on March 16, 1970. Thus it failed to file within the time provided for in §10-102(2)(c) and the perfection of its security interest lapsed. Lester E. Denonn in a practice commentary to §10-102(2) of the Code (62 1/2 McKinney's Consolidated Laws of New York Annotated, Part 3, p.650) says:

> Notwithstanding the specific repeal of the various provisions of the New York law as set forth in this section, the validity and enforceability of a secured transaction, effected prior to September 27, 1964, will be governed by such repealed law as if it had not been repealed. In order, however, to preserve the perfection of the security interest after the effective date of the Act and to bring the transaction under the protective provisions of the Act, it will be necessary for the secured party to file a continuation statement within the time prescribed for such filing in the case of each of the three classifications of secured transactions as set forth in subsec. (2) of this section. (Emphasis supplied)

POINT IV

THIRD NATIONAL FAILED TO PERFECT ITS SECURITY INTEREST BY FILING A CONTINUATION STATEMENT IN THE FORM PRESCRIBED BY 10-102(2) OF THE CODE

Thus, as pointed out in Point III above, with respect to transactions entered into before September 27, 1964, a party, in order to perfect its security interest, must file a "continuation statement" in the form prescribed by §10-102(2).

Such continuation statement: (1) must contain the signature of the secured party; (2) must identify the security agreement; (3) must state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto and the filing number, if any; and (4) must state that the security agreement is still effective.

Third National did not file a continuation statement. It filed a U.C.C.-1 financing statement (Trustee's Exh. D, S.M. 4/26/73, p.80, record #115). A continuation statement and a financing statement are distinguishable documents each serving a different purpose. It has been held that the filing of a financing statement in lieu of a required continuation statement will not cure the lapsed perfection of a security interest. Eastern Indiana Production Credit Association v. Farmers State Bank, 31 Ohio App.2d 252 (1972), 11 UCC Reporting Service 664.

An examination of the U.C.C.-1 financing statements

filed by Third National discloses that they are deficient in respect to (2) above and, as in Eastern Indiana, supra, at 11 UCC Reporting Service 664, 667, they were deificient in (4) above. In the U.C.C.-1 financing statements filed by it, Third National, in identifying the security agreement, states:

> Assignment of any and all renewal commissions due and payable to debtor under his contract with Massachusetts Mutual Life Insurance Company from and after November 10, 1938.

It is submitted that this is not a proper identification of the security agreement. The security agreement is dated November 10, 1938 and no such date is found in the U.C.C.-1 financing statements filed. The security agreement is identified in the most general terms as "Assignment". Moreover, there is no statement that the "security agreement is still effective." This is a fatal defect rendering the security interest invalid against the trustee pursuant to the provisions of §§70c of the Bankruptcy Act, 11 U.S.C. 110c and 9-301 of the Uniform Commercial Code.

Under §70c of the Bankruptcy Act the trustee has the status of a lien creditor as of the date of the filing of the petition in bankruptcy by Simon. U.C.C. §9-301(1)(b) provides that an unperfected security interest is subordinate to the rights of a person who became a lien creditor without knowledge of the security interest and before it is perfected. Under U.C.C. §9-301(3) a trustee in bankruptcy is a "lien creditor" from the date of the filing of the petition. See 4A Collier on Bankruptcy (14th ed.) ¶76.62A [3.2] p. 703. Since Third

National never perfected its security interest by filing a continuation statement, the trustee's lien status is superior to that of Third National. For purposes of §70c, a security interest must be perfected. Where filing is required for perfection it must occur before the insitution of the bankruptcy proceeding in order for the security interest to withstand attack by the trustee under §70c. See 4A Collier, op cit, ¶76.62A [4] p. 705.

By holding, although after an expression of uncertainty (Spec. Mas. rpt. January 30, 1974 p. 25, record #116) that U.C.C. §9-103(1) was inapplicable, the Special Master and presumably Judge Frankel found no further need to comment upon the trustee's assertions in Points III and IV of this brief. The trustee maintains, however, that U.C.C. §9-103 of the New York Uniform Commercial Code is applicable and the security interest of Third National is void against the trustee.

POINT V

THE RIGHT OF THE TRUSTEE TO THE FUND ON DEPOSIT IN THIS ACTION IS SUPERIOR TO THAT OF THIRD NATIONAL BY VIRTUE OF THE RIGHTS CONFERRED UPON THE TRUSTEE UNDER SECTION 70e OF THE BANKRUPTCY ACT.

Section 70e of the Bankruptcy Act gives the trustee the rights that the bankrupt Simon's creditors would have had

under state law. Congress thus preserved the rights creditors would have had to invalidate transfers under state law. Cowans, Bankruptcy Law and Practice §743, p. 386.

Section 70e is all inclusive. It reaches out and gathers in for the trustee all the powers of avoidance available to creditors under applicable state and federal law. It is intended to reach fraudulent or otherwise invalid transfers or encumbrances that would escape particularly the more precise and narrow limits of §§60, 67a and d, and in some cases, &70c of the Bankruptcy Act. See 4A Collier, op cit., ¶70.69[1], pp. 762,776. In addition the Court is respectfully referred to the following additional authorities: 2 Hawkland, A Transactional Guide to the Uniform Commercial Code 683, 695 (1964); 19 Alabama Law Review 59, 62 (1966) and Countryman, Cases on Debtor and Creditor 453, 489 (1964). See also 4A Collier, op cit., ¶70.62, p. 694.

The Special Master's report and Judge Frankel's adoptive decision were virtually silent on the trustee's position under §70e. The trustee will show that this section is controlling and subrogates the trustee to Stuart's lien thus making the trustee's rights in the renewal commissions superior to the junior lien of Third National therein.

In 1970, Third National belatedly and in its confusion attempted to perfect what it thought was a security interest in Simon's renewal commissions by filing financing statements in Massachusetts and New York (Stipulation of Facts No. 25 and 26, record #127). In 1967, Stuart obtained a judgment against Simon and on or about January 19, 1968 Stuart caused the

Sheriff of the City of New York to serve Mass Mutual with an execution and Sheriff's levy (Stipulation of Fact No. 21, record #116). When this levy was made upon Mass Mutual, the insurance company was holding $7,606.85 of Simon's renewal commissions (S.M. 4/27/73, pp. 176-177, record #114). Stuart's levy was thereafter extended by various order of the New York Supreme Court through and including May 5, 1972 (Stipulation of Fact No. 21, record #116).

It is evident from the foregoing facts that Stuart acquired a lien of $7,606.85 on Simon's renewal commissions without knowledge of, and long prior to the time that Third National attempted to perfect what it believed to be a security interest in Simon's renewal commissions. By virtue thereof Third National's security interest, assuming arguendo that it is a valid one, is subordinate to the right of Stuart as a lien creditor U.C.C. §9-301(1)(b). It is precisely this question of the rights of Third National and Stuart inter esse, which they scrupulously sought to avoid throughout this proceeding (See trustee's comments in Point below).

The above-cited authorities clearly demonstrate that since the alleged security interest of Third National is subordinate to the lien of Stuart, then it is also subordinate to the claims of the trustee, by virtue of §70e of the Bankruptcy Act. The hypothetical facts presented in 2 Hawkland, op cit. 695 are identical to the actual facts in the instant case. As stated therein:

> The interest of the judgment creditor (lien creditor) is superior to that of the subsequently perfected security interest under the rules of section 9-301 of the U.C.C., and therefore, the latter interest is vulnerable in part (i.e., to the extent of $500) outside of bankruptcy. Being vulnerable in part outside bankruptcy, the interest becomes totally defeasable in bankruptcy under the curious and confiscatory Rule of Moore v. Bay. (Emphasis supplied)

Countryman, op cit., at page 489 is to like effect:

> [W]here the only consequence of a delay in filing is to invalidate a chattel mortgage as to creditors who acquire a lien before filing, and the mortgage is filed before bankruptcy, §70c will not avail the trustee-and neither will §70e unless an actual creditor with a provable claim acquired a lien before filing. In re Consorto Construction Co., 212 F.2d 676 (3rd Cir. 1954), cert. denied, 348 U. S. 833 (1954) (Emphasis supplied)

On this subject the author of the article in 19 Alabama Law Review states on page 62:

> Under §70(e) he might have recourse to the rights of other lien creditors and thus acquire rights at some date earlier than the filing of the petition.

The view of the text writers finds abundant support in the reported cases. In Azar v. Electric Constructors, Inc., 293 F. Supp. 33 (M.D. Ala. 1967), the bankrupt's landlord acquired a lien on the bankrupt's property between the execution of a security instrument, and its belated recording. In voiding the security interest against the trustee under §70e(1) of the Bankruptcy Act, the court says at page 36:

> The recordation of these trust receipts before bankruptcy cannot protect defendant here as against the trustee. If they are truly trust receipts, as defendant asserts, then their late recording has allowed subsequent creditors with possible claims to arm the trustee. If they are conditional

> sales contracts or chattel mortgages, as trustee asserts, then their non-recordation in Probate in Montgomery County, as required . . ., is likewise effective to arm the trustee.

The Fifth Circuit Court of Appeals unanimously affirmed in Electric Constructors, Inc. v. Azar, 405 F.2d 475 (1968). At page 476, the court states:

> Appellant's contentions with respect to the Section 70e issue are equally unconvincing. It is indisputable that, by late recordation of the security interests, Appellant lost any rights to relation back to the date of execution, acquired only prospective protection, and remained vulnerable to any intervening lien creditor. . . Consequently, the Bankrupt's landlord became an intervening lien creditor into whose shoes the Trustee might step to declare the payments and repossession to be voidable transfers within the meaning of Section 70e(1). (Emphasis supplied)

See also Corley v. Cozart et al., 115 F.2d 119 (5th Cir. 1940), where the court says, at page 121:

> The bill of sale to secure debt, being admittedly invalid as against subsequent creditors without notice, was properly held to be invalid in its entirety on objection of the Trustee in Bankruptcy. A claim void against some of the creditors of the bankrupt may be avoided in its entirety by the Trustee even though creditors generally benefit by the avoidance.

and Abramson v. Boedeker, 379 F.2d 741 (5th Cir. 1967), where the court says at page 745:

> . . . the power of the Trustee acting for the general estate to reach back and unscramble transactions which are vulnerable to specific sections of the Act, e.g., §§67, 70, etc., is not restricted to those transactions occurring within the four months' prefiling period.[6]

In note 6 at page 745, the court says:

> 6 Some transactions are, of course, vulnerable for four months only. See, e.g., second act of bankruptcy under §60, 11 U.S.C.A. §96; 1 Collier, Bankruptcy, ¶¶3201,3202(14th ed. 1966).
>
> The trustee's powers under other sections of the Act are not so restricted:
>
> > "Section 70e(1) prescribes no conditions or time limits within which transactions are deemed voidable. It merely incorporates the applicable state or federal law in this regard. Consequently, the four months; or one year's limitations established in §§60 and 67 are inapplicable in a suit under §70e."
>
> 4 Collier ¶70.71 at 1547; Blackford v. Commercial Credit Corp., 5 Cir., 1959, 263 F.2d 97, 110. See also §11 U.S.C.A. §29, minimum 2-year statute of limitation.

In commenting upon the trustee's powers under §70e, the court says in note 16, at pages 748-749:

> 16. The Trustee's §70e powers can lead to some weird Tinker-to Evers-to Chance successive avoidances of transfers. See Cherno v. Dutch American Mercantile Corp., 2 Cir., 1965, 353 F.2d 147; In re Baumgarter, 7 Cir., 1931, 55 F.2d 1041; cf. Bergin v. Waterson, 10 Cir., 1960, 279 F.2d 193. Mixing the figuratives a bit more, the Eighth Circuit characterizes the position of the trustee as standing "in the shoes of the bankrupt," but also in the overshoes of the creditors* * * Schneider v. O'Neal, 8 Cir., 1957, 243 F2d. 914, 918.
>
> In any event if the transfer is avoidable at all by a creditor, it is voidable in full for all creditors regardless of the dollar amount of the prevailing claim. Moore v. Bay, 1931, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133; Roscoe Moss Co., v. Duncan, 9 Cir., 1964, 336 F2d. 670; In re Plonta, 6 Cir., 1962, 311 F.2d 44; Levine v. Johnson, 5 Cir., 1961, 287 F2d. 623; Corley v. Cozart, 5 Cir., 1940, 115 F.2d 119.

At page 750 the court concludes:

> And, of course, to the attachment lien of Superintendance there may also be added the Government's tax lien, 26 U.S.C.A. §§6321, 6422, 6323.
>
> The upshot of it is that the Government, Superintendence and Excel had rights superior to the Bank's earlier non-recorded assignment. That is all the Trustee needed. So this case must now go back for the entry of a judgment requiring the Bank's assignee Boedeker to pay to the Trustee the amount received by him.

See also In re Plonta, 311 F.2d 44,47 (6th Cir. (1962); In re Valley City Furniture Company, 161 F.Supp. 39, 41-43 (W.D. Mich., 1958); In re Truscott Boat & Dock Co., 92 F.Supp. 430, 432-434 (W.D. Mich., 1950) and Deane v. Fidelity Corporation of Michigan, 82 F. Supp. 710, 715 (W.D. Mich., 1949).

POINT VI

THE ALLEGED SECURITY INTEREST OF THIRD NATIONAL CONSTITUTES A FRAUDULENT CONVEYANCE UNDER SECTIONS 273, 274, 275 AND 276 OF THE NEW YORK DEBTOR AND CREDITOR LAW AND SECTION 67d OF THE BANKRUPTCY ACT

Sections 270 through 276 of the New York Debtor and Creditor Law and Section 67d of the Bankruptcy Act deal with the recovery of fraudulent conveyances by the trustee (the Debtor and Creditor Law provisions being brought into the trustee's arsenal by the provisions of §70e of the Bankruptcy Act). For the purposes of §67d of the Bankruptcy Act the fraudulent transfer from Simon to Third National was

consummated when Simon signed the U.C.C.-1 form of financing statement, gave it to Third National for filing and then did not file his bankruptcy petition for four months. If, however, the trustee's prior analysis is correct that Third National never perfected its security interest (Points III and IV above), than the transfer took place immediately before the filing of the bankruptcy petition. If Third National is correct and the filing of the financing forms perfected its security interest, the date of the transfer would be March 16, 1970, the date when the financing form was filed with the Department of State of the State of New York. Section 67d(5) of the Bankruptcy Act provides:

> For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferree therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

The trustee's position is that the transfer to Third National constitutes a fraudulent conveyance under both the "constuctive fraud" sections of the Debtor and Creditor Law (§§273, 274 and 275) and the Bankruptcy Act (§67d(2)(a),(b) and (c))and the "actual fraud" sections of these statutes (§276 of the Debtor and Creditor Law and 67d(2)(d) of the Bankruptcy Act).

Third National has sought to insulate the transfer from attack by claiming that a fair consideration was given to Simon in the form of an antecedent debt. See §67d(1)e of the Bankruptcy Act and §272a of the Debtor and Creditor Law. Although Third National is correct when it states that fair consideration is an essential element under §67d(2)(a),(b) and (c) and §§273, 274 and 275 of the Bankruptcy Act and Debtor and Creditor Law, respectively, it is not an essential element under §67d(2)(d) of the Bankruptcy Act and §276 of the Debtor and Creditor Law which deal with actual intent to hinder, delay or defraud creditors.

Third National erroneously contends that since there was consideration given by it for the assignment by Simon, there is "fair consideration" and therefore there cannot be a fraudulent transfer. An examination of both §67d of the Bankruptcy Act and §272 of the Debtor and Creditor Law clearly reveal that this contention is unfounded.

The following definition of fair consideration appears in §67d(1)(e) of the Bankruptcy Act:

> . . .(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportioately small as compared with the value of the property or obligation obtained. (Emphasis supplied)

The following definition of fair consideration appears in §272 of the Debtor and Creditor Law:

> §272. Fair consideration
>
> Fair consideration is given for property or obligation,
>
> a. When in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained. (Emphasis supplied)

It is the contention of the trustee, and abundantly established by the record in this case, that the element of good faith is lacking.

In 4 Remington on Bankruptcy §1652.2, pages 173-174 it is stated:

> . . .But good faith, or "bona fides," is not present where the transferree, lienor, or obligor, at the time of the transaction, had knowledge of facts sufficient to put him on inquiry as to insolvency, or potential insolvency, of the debtor, or of his intention to defraud creditors or effect a preference of certain creditors over others. Knowledge may, in fact, be inferred from circumstances. As stated in some decisions, "good faith" presupposes a lack of knowledge of such facts as would put a reasonable person on inquiry. (Emphasis supplied)

Looking to the record in this case, it is indisputable that Third National was aware of Simon's insolvency or potential insolvency. On March 15, 1967, Third National wrote to Mass Mutual (Trustee's Exh. L, S.M. 4/26/73 p. 184, record #115). Third National informed Mass Mutual that Simon's note dated June 17, 1963, in the sum of $309,000. had been past due since July 17, 1963 (almost four years), and that the balance due on the note as of September 2, 1966 was $160,242.37. Third National demanded in this letter that in accordance with the terms of Simon's assignment to the Bank, Mass Mutual remit to it, commencing on the receipt of the letter, all commissions as they became due and payable under Simon's contract with Mass Mutual dated July 1, 1932. From March, 1967, through the month of December, 1967, Mass Mutual remitted Simon's renewal commissions to Third National (S.M. 4/27/73, p.171, record #115; S.M. 9/21/73, p.43, record #149). Beginning in January, 1968, Simon's renewal commissions were escrowed by Mass Mutual (S.M. 4/27/73, p.174, record #115). Payments to Third National were stopped and renewal commissions escrowed at this time because Mass Mutual was served with a restraining notice by Irving Geist, one of the defendants in this action. The restraining notice was based upon a judgment obtained by Geist on September 28, 1967 for $41,620. On January 15, 1968, Mass Mutual wrote to Third National (Trustee's Exh. S, S.M. 4/27/73, p.203, record #115), advising Third National of the service of the Geist

restraining notice. Mass Mutual informed Third National that unless the restraining notice was lifted before January 29, 1968, the next date on which payment would ordinarily be made to Third National under the assignment, it would be necessary for Mass Mutual to escrow the renewal commissions. A copy of this letter was sent to the then attorney for Third National. On January 19, 1968, Mass Mutual was served with an execution and Sheriff's levy on behalf of Stuart on her $71,000. judgment (Stipulation of Fact No. 19 and 20, record #127). On January 25, 1968, Mass Mutual wrote to the attorneys for Third National (Trustee's Exh. Q, S.M. 4/27/73, p.201, record #115), and advised them of the service of the Stuart lien. On February 19, 1968, Third National's attorneys wrote to Mass Mutual (Trustee's Exh. Y, S.M. 4/27/73, p.221, record #115) and demanded payment of the sums being held in escrow and informed Mass Mutual that unless this was done an action would be instituted by Third National. On February 20, 1968 (Trustee's Exh. X, S.M. 4/27/73, p. 219, record #115), the Assistant General Counsel of Mass Mutual met with the cashier of Third National and its counsel and discussed the entire matter of Simon's debt and the outstanding judgments. On May 9, 1969, Mass Mutual wrote to the cashier of Third National (Trustee's Exh. V, S.M. 4/27/73, p.215, record #115) and informed Third National that Mass Mutual, on the basis of the indebtedness to it by Simon, had offset the sum of $19,278.75

against Simon's escrowed renewal commissions.

On May 12, 1969 (Trustee's Exh. N and AG, S.M. 4/27/73 p. 193, record #115 and S.M. 9/21/73 p. 134, record #149), Simon, accompanied by his nephew who was an accountant, met at the Bank to discuss the "status of his affairs" with Mr. Brunel and Mr. Moekler of Third National and Mr. Buntin of Mass Mutual. As a result of this discussion, Third National determined that according to the present payment schedule value on the renewal premiums, there would be just about enough to take care of Third National. Third National was informed by Simon that he owed National Bank of North America $240,000. Mr. Brunel impressed on Simon that one of the first requisites for Third National helping him out, possibly by granting his request to use $30,000. of the escrowed commissions, would be for Simon to first pay off a small demand note of $4,350. As of June 2, 1969 (Trustee's Exh. O, S.M. 4/27/73, p. 194, record #115) neither Third National or Mass Mutual received any word from Simon since the meeting of May 12, 1969 "concerning the workout of his financial problems."

In March of 1970 Simon had a telephone conversation with Thomas C. Platt, Esq., of the firm of attorneys representing Third National in this action. During this conversation, Mr. Platt said to Simon:

> Now, don't you go through any bankruptcy proceedings for the next four months. (S.M. 4/26/73 p. 79, record #115)

This was the conversation in which Simon was told to sign the U.C.C.-1 financing form later used by the Bank to allegedly perfect its security interest. In response to this, Simon said "Very well" and hung up(S.M. 4/26/73, p. 79, record #115). Barely four months after this conversation and four months and five days from the date of the alleged perfection of Third National's security interest by the filing of the U.C.C.-1 form on March 16, 1970 with the New York Department of State, Simon filed his bankruptcy petition on July 21, 1970. On the above facts it is uncontrovertable that had the bankruptcy petition been filed five days earlier, the alleged perfection of the security interest would have been a void preference under §60 of the Bankruptcy Act. The inescapable inference is that the Bank knew that Simon was hopelessly insolvent; that Third National had an unperfected security interest in the renewal commissions (thus all the filing activities in Massachusetts and New York in early 1970) and it, together with Simon, saw to it that the Bank, in bad faith, would secure a preference. This knowledge of Simon's insolvency and the imminency of his bankruptcy proceedings forecloses Third National from claiming that it acted in good faith within the definition of that term in §§67d and 272 of the Bankruptcy Act and the Debtor and Creditor Law, respectively.

Apart from the absence of good faith to defeat Third National's claim that it gave fair consideration,

the above facts demonstrate that Third National and Simon actually intended to hinder, delay and defraud Simon's other creditors. Sections 67d(2)(d) of the Bankruptcy Act and 276 of the Debtor and Creditor Law deal with transactions made with "actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors. . ." Where actual intent is present there is no requirement to prove the elements of a "constructive fraud". In 4 Collier, op cit., ¶67.37[1], pp. 531-532, it is stated:

> Where a conveyance is made with the requisite actual intent, the fact of fair consideration is immaterial. Likewise, proof of solvency at the time of the transfer or directly thereafter is inconclusive where the issue is solely one of fraudulent intent, and the trustee is under no duty, in proceeding under §67d(2)(d), to show that the transaction was consummated during the bankrupt's insolvency or precipitated his insolvency.

It should be noted that Third National was not acting as the passive recipient of a fraudulent transfer but was the motivating force behind it. As such it evidenced an actual intent to defraud Simon's other existing creditors. See 37 Am. Jur. 2d., Fraudulent Conveyances, §§6-11, pp. 696-702.

POINT VII

THE STUART LIEN IS VALID ONLY TO THE EXTENT OF $7,606.85

Stuart entered a judgment against Simon in the United States District Court for the Southern District of New York on December 27, 1967, and on January 9, 1968, the judgment was docketed in the office of the Clerk of the Supreme Court, New York County. A transcript of the judgment was issued, following which executions were delivered to the Sheriff of New York City, New York County Division (Stipulation of Fact No. 19, record # 127). On or about January 19, 1968, Mass Mutual was served with an execution and Sheriff's levy on the Stuart judgment (Stipulation of Fact No. 20, record #127).

From March, 1967, through the month of December, 1967, Mass. Mutual remitted Simon's renewal commissions to Third National (S.M. 4/27/73, p.171, record #115; S.M. 9/21/73, p. 43, record #149). Beginning in January, 1968, Simon's renewal commissions were escrowed by Mass Mutual (S.M. 4/27/73, p. 174, record #115). As of December 31, 1967, Mass Mutual was not holding in any form any commissions that were due to Simon, everything having been remitted to Third National (S.M. 4/27/73, pp. 174-175, record #115). Renewal commissions were payable on a monthly basis usually at the end of the month and renewal commissions were never accumulated beyond a month's time (S.M. 4/27/73, pp. 172-173, record #115;

S.M. 9/21/73, pp. 30-31, record #149). At the end of the month of January, 1968, Mass Mutual was holding in escrow a total of $7,606.85 in renewal commissions payable to Simon under his general agent's contract (S.M. 4/27/73, pp. 176-177, record #115). Thus when Stuart caused a levy to be made on Mass Mutual on or about January 19, 1968, Mass Mutual was holding a maximum of $7,606.85 of Simon's renewal commissions.

Paragraph 10 of the general agent's agreement entered into between Simon and Mass Mutual (Exhibit A annexed to complaint) provides:

> That any commissions to which General Agent may become entitled under any provision of this contract shall accrue only as to the premiums on which such commissions are to be reckoned are collected and paid over as herein provided. . . .

A renewal commission became due to Simon when the premium for which a commission was paid was paid to Mass Mutual (S.M. 4/27/73, p. 172, record #115). Only if the renewal premium was paid would Simon get a commission- if there were no payment, there was no commission (S.M. 9/21/73, pp. 31-32, 47, record #149). As menticned above, the sum of $7,606.85 being held in escrow by Mass Mutual at the end of January, 1968, represented renewal commissions payable to Simon under his general agent's contract (S.M. 4/27/73, pp. 176-177, record #115). Thus, when Stuart

caused a levy to be made on Mass Mutual on or about January 19, 1968, no lien was created on any payments due Simon under the floor plan agreement with Mass Mutual (Exhibit C to the complaint).

On December 31, 1962, the general agent's agreement (Exhibit A to the complaint) was terminated, and on September 16, 1964, Simon executed a floor plan agreement pursuant to which Mass Mutual agreed to make certain payments to Simon (Stipulation of Fact No. 15, record #127). Paragraph 2 of the floor plan agreement provides:

> If, after the termination of the Contract and during the lifetime of the General Agent, the amount of the General Agent's Commissions during the twelve report month period immediately preceding any anniversary of the date of such termination shall be less than twenty-seven thousand eight hundred eighty-eight dollars ($27,888), the Company will pay to the General Agent on the first day of the next succeeding calendar month . . . .the difference between such amounts. (Emphasis supplied).

Paragraph 5 of the floor plan agreement provides:

> This agreement shall terminate on:
>
> (a) the death of the General Agent; or
>
> (b) violation by the General Agent of the provisions of Paragraph 2(b); or
>
> (c) revocation by the Company as of any anniversary of the date of termination of the contract.

Since Simon's general agent's agreement terminated on December 31, 1962, the anniversary date of such termination under paragraph 2 of the floor plan agreement during any year in which the floor plan agreement was effective would be December 31. Any payments that might become due to Simon under the floor plan agreement would be payable to him "on the first day of the next succeeding calendar month," to wit, January 1. Thus, January 1 would be the"commencement date" of payment under the floor plan agreement. In order to be entitled to any payments under the fllor plan agreement, Simon would, under paragraph 2 thereof, have to be alive on January 1. Only if Simon were alive would he continue to accrue benefits under the agreement. (S.M. 9/21/73, p. 73, record #149).

Article 52 of the CPLR deals with "Enforcement of Money Judgments." CPLR §5201(a) provides:

> §5201. Debt or property subject to enforcement; proper garnishee.
>
> (a) Debt against which money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state. (Emphasis supplied).

In commenting upon CPLR §5201(a), it is stated in 6 New York Civil Practice, Weinstein-Korn-Miller, at page 52-13:

> Perhaps the question most frequently litigated in disputes relating to the propriety of enforcing a judgment against a particular debt is whether the debt is certain.

> Any obligation to pay for services actually performed or any obligation that is matured at the time the judgment creditor seeks to enforce his judgment against it satisfies the certainty requirement. If there are any unfulfilled conditions to the judgment debtor's right to payment of the debt, the debt is not certain. For example, it has been held that a percentage of profits contract was uncertain because of the possibility that the garnishee would not operate profitably. (Emphasis supplied)

In support of the last sentence of the above-quoted statement, Weinstein-Korn-Miller cite Frederick v. Chicago Bearing Metal Co., 221 App. Div. 588, 224 N.Y.S. 629, where at page 630 of 224 N.Y.S. it is stated:

> There can, then, be no attachment of or levy upon a contingent right, which may or may not come a cause of action according to the occurrence or nonoccurrence of a future event.

In Herman & Grace v. City of New York, 130 App. Div. 531, 114 N.Y.S. 1107, the court says at page 1110 of 114 N.Y.S.:

> It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future and not dependable upon any contingency. (Emphasis supplied)

Although the court in Herman & Grace, supra, had before it an attachment, the principle enunciated is equally applicable to an execution. Frederick v. Chicago Bearing Metal Co., supra.

The sound reason and rationale for the foregoing rule is stated in 176 East 123rd Street Corp. v. Frangen, 67 Misc.2d 281, 323 N.Y.S. 2d 737,740, as follows:

> A lien cannot be elevated to a position superior to the interest to which it attaches. When voluntarily created it only attaches to such interest as the lienor has. . . and when involuntarily created, as by judgment, it is "a lien only upon the interest of [the] judgment debtor at the time the judgment was docketed" . . .

In Glassman v. Hyder, 23 N.Y. 2d 354, 296 N.Y.S. 2d 783, 786, the court says:

> A debt to be attachable must be "past due or * * * yet to become due, certainly or upon demand of the judgment debtor"(CPLR 5201, subd. [a]). Where a duty to pay is conditioned upon the creditor's future performance, or upon contractual contingencies, there is no debt certain to become due (see Sheehy v. Madison Sq. Garden Corp., 226 N.Y. 44,47, 193 N.E. 633; Herrmann & Grace v. City of New York, 130 App. Div. 531, 535, 114 N.Y.S. 1107, 1111, affd. 199 N.Y. 600, 93 N.E. 376).

See also Mobil Oil Corporation v. Lovotro, 65 Misc. 2d 729, 318 N.Y.S. 2d 989, and Suffolk Auto Liquidators, Inc. v. Eastern Auto Auction Inc., 343 N.Y.S. 2d 806, 808 where the court says:

> . . . .intangibles are not subject to attachment or levy where they are of a contingent nature and may or may not become due depending upon future performance or the occurrence or nonoccurrence of a future event or other contractual contingency.

See also David B. Siegel, Practice Commentary to CPLR §5201(a), McKinneys Consolidated Laws of New York Book 7B, §5210(a), pp. 24-25, where it is stated:

> Subd. (a) governs debts and causes of action. Subd. (b) is sweeping in its language, and permits enforcement against"any property which could be assigned or transferred". If one were to give the word "property" therein its broadest meaning, subd. (b) would make subd. (a) superfluous. If subd. (a) is to have any meaning, it would have to be construed as a modification to the extent necessary, of subd.(b), and where the thing sought is a debt alleged to exist in favor of the judgment debtor, it is subject to levy only where it"is. . . to become due, certainly or upon demand". That would eliminate from levy contingent debts not

certain to become due to the judgment debtor. (Emphasis supplied)

For the foregoing reasons, the Stuart levy created a lien on the funds held at that time by Mass Mutual. At the time of the service of the execution Mass Mutual held only $7,606.85 and that is the extent of the Stuart lien.

POINT VIII

THE LIEN OF STUART RESULTING FROM THE EXECUTION SERVED UPON MASS MUTUAL BECAME DORMANT AND VOID AS AGAINST THE TRUSTEE WHO IS NOT BARRED BY RES JUDICATA FROM SEEKING TO AVOID THE LIEN ON THIS GROUND

By orders dated March 12, 1968, July 9, 1968, July 1, 1969, June 9, 1970, May 7, 1971 and May 5, 1972, the Supreme Court of the State of New York extended the levy made by Stuart. By virtue of these five ex parte orders, the duration of the levies obtained by Stuart has been extended for a period of over five years. During all this time no attempt was ever made by Stuart to enforce collection of her judgment against Simon. It is submitted that this inactivity caused the levy to become dormant. A trustee in bankruptcy has the right to assail the validity of a lien for dormancy. In re Monarch Acetylene Co., 229 Fed. 474 (W.D.N.Y. 1916).

It is the trustee's contention that Stuart's failure to diligently enforce her levy instead of resorting to constant and prejudicial extensions thereof, resulted in the liens becoming dormant and void. See 2 Freeman on Executions

§271, p.1522.

The issue of dormancy was not litigated before the Supreme Court when the trustee sought an order vacating the ex parte orders extending the lien. To do so would have been inconsistent with the trustee's position that the orders were improperly granted and should therefore be set aside. The issue of dormancy hinges upon a necessary recognition that the orders were properly granted but that the lienor, through inactivity, allowed the lien to become dormant. The only forum to which the trustee could address his argument calling for the vacation of the orders was the court that granted them, the Supreme Court of the State of New York. This, however, does not bind the trustee to litigating the dormancy issue in the same forum since the trustee's claim of dormancy had already been made in this Interpleader action and was properly before this court. The Supreme Court's denial of the trustee's application to vacate the ex parte orders was therefore not res ajudicata upon the issue of dormancy and the Special Master erred in so holding.

POINT IX

ASSUMING ARGUENDO THAT BOTH THE STUART LIEN AND THIRD NATIONAL'S SECURITY INTEREST ARE VALID AGAINST THE TRUSTEE, IT WAS IMPROPER TO PERMIT THE DISPOSITION OF THE PROCEEDS OF THE RENEWAL COMMISSIONS AND FLOOR PLAN PAYMENTS IN THE MANNER UTILIZED BELOW

Mass Mutual has deposited with the Registry of the District Court $166,122.16 representing the proceeds of the renewal commissions through January 1, 1973 (these renewal commissions have continued to accrue since that date and have been made the subject of this Interpleader action). In addition Mass Mutual has deposited $131,437.23 into the Registry representing floor plan payments up to and including January 1, 1973 (the floor plan payments are accruing as well). These funds are two distinct funds. If the security interest of Third National is valid as against the trustee, that interest attaches to the renewal commissions only since Third National has no security interest in the floor plan payments. Furthermore, if Stuart's lien is valid as against the trustee it is likewise valid and superior to the security interest of Third National pursuant to §9-301(b) of the Uniform Commercial Code. Thus, Stuart should first exhaust its lien claim on the $71,000. judgment against the renewal commissions of $166,122.16 leaving the balance to Third National on its secured but subordinate interest. The trustee would then recover, for the general creditors, the entire balance in the floor plan fund of $131,437.23 plus accruals (subject, of course, to whatever rights Simon might have in these funds, this point being covered in Point X below).

Instead of this result which would recognize the priority between Stuart and Third National arising from Third National's failure to perfect its security interest, the Special Master allowed Third National to claim first against the renewal

commissions and Stuart to claim first against the floor plan payments(Special Master's rpt. pp. 45-46, record #116). By so doing the Special Master effectuated the provisions of an agreement between Stuart and Third National whereby the proceeds of this Interpleader action would be divided between them to their mutual benefit but to the prejudice of the trustee and Simon's creditors generally.

On February 15, 1972, Stuart and Third National jointly moved for partial summary judgment. In paragraphs "5" and "6" of the affidavit sworn to February 15, 1972 submitted by Stuart, it is stated:

> 5. Stuart claims, and Third National concedes, for purposes of this motion, the entire Floor Plan Payments by virtue of a levy of execution duly served on Mutual as a garnishee, in enforcement of a judgment in the amount of $71,000.00 obtained by her decedent on December 27, 1967 . . . The levy has been duly extended and is in full force.
>
> 6. Third National claims, and Stuart concedes, for purposes of this motion, the Renewal Commissions on the basis of an assignment which it received from Simon on or about November 10, 1938 . . . as collateral for loans which it made to Simon, the unpaid balance of which (including interest) was $152,735.45 on May 12, 1970.
>
> [As between themselves, Third National and Stuart have stipulated that Stuart has a claim superior to that of Third National in the Floor Plan Payments and that Third National has a claim superior to that of Stuart in the Renewal Commissions.] (Record #69).

In paragraph "6" of the affidavit of Wilson Brunel, sworn to December 20, 1971, submitted in support of Third National's motion for partial summary judgment, it is stated:

> 6. Defendant Third National Bank concedes and admits for the purpose of this motion that defendant Dasha Auerbach Stuart's . . . first right to $49,368.01 of the sum of $144,382.22 on deposit in the Registry of this Court; such sum of $49,368.01 representing personal commissions and floor plan payments for the years 1967, 1968 and 1969 which are subject to the aforesaid judgment in favor of the aforesaid Josef Auerbach docketed on January 9, 1968.

Thus Stuart and Third National realized the primacy of the Stuart lien over Third National's unperfected security interest and Third National gratuitously gave up its "claim" to the floor plan (it had none, as pointed out above) in exchange for Stuart's relinquishment of its superior claim to the renewal commissions.

It is submitted that this marshaling of assets embodied in the agreement between Stuart and Third National and manifested in the Special Master's report is improper. The doctrine of marshaling should not apply where it would prejudice the rights of third persons. Bruns v. First Trust & Deposit Co., 295 N.Y.S. 412, 250 App. Div. 370 (1937); Equitable Sav. & Loan Association v. 6322 20th Ave. Corp., 235 N.Y.S. 2d 394 (1962). Here the trustee's rights would be prejudiced and the trustee, as well as Stuart and Third National, is a lien creditor in both the renewal commissions and the floor plan payments by virtue of that status afforded by §70c of the Bankruptcy Act.

In accordance with the foregoing, the judgment below should be modified so as to require the exhaustion of the Stuart lien upon the renewal commissions.

POINT X

PURSUANT TO THE PROVISIONS OF §§70a AND 70c OF THE BANKRUPTCY ACT, THE FLOOR PLAN PAYMENTS ACCRUING AFTER JANUARY 1, 1971 PASS TO THE TRUSTEE AND NOT TO SIMON AS WAS HELD BELOW

The Special Master held at page 41 of his report of January 30, 1974 (record #116) that:

> The status of the floor plan payments which occurred after January 1, 1971 is a more complex and unique question. While they have some characteristics of vested renewal commissions, and some of a pension, on the face of the agreement, and to the extent that the evidence shows, the continued payment by Mass Mutual is a gratuity. As a contingent gratuity it would not appear to be assignable. Although Mass Mutual saw fit to pay these benefits in 1971 and 1972 (the record is not explicit as to 1973 but, the inference was that the benefit is still accruing) this could not have been foreseen with any certainty at the time of bankruptcy. . . These assets, therefore, should be paid to Simon.

This portion of the report was adopted by Judge Frankel without comment.

This holding was error because it completely overlooks the controlling provisions of §70a of the Bankruptcy Act which provide, in pertinent part:

> (a) The trustee of the estate of a bankrupt. . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . .
>
> (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred

> or which might have been levied upon and sold under judicial process against him, or otherwise seized, impoundered or sequestered. . . . (Emphasis supplied)

The test is therefore if the bankrupt could have transferred his interest in the floor plan payments or if the floor plan payments could have been levied upon and realized upon by a creditor of Simon, they pass to the trustee under §70(a)(5) of the Bankruptcy Act.

Simon could have transferred or assigned his interest in the floor plan payments. The Floor Plan Agreement (Annexed to the complaint as Exhibit C) in no way prohibits assignments by Simon of the floor plan payments. In essence the agreement seeks to guaranty a minimum income to the agent by supplementing the total renewal premium commissions that fall below $27,888.00 with an amount that is added to the actual renewal premiums so that they total $27,888.00. If the renewal premium commissions exceed $27,888.00 for the period in question, the agent receives nothing under the floor plan. In the same way that Simon assigned his renewal commissions to Third National, he could assign the difference in commissions specified in the floor plan.

Secondly, a creditor of Simon's could have levied upon the floor plan payments and, in fact, the Special Master held that Stuart had levied upon them and secured a lien. At page 28 of his report, the Special Master states:

> . . . when the [floor plan] payments came due, the levy, still being in effect, attached to them, at least until such time as Simon filed in bankruptcy. (Record #116).

Thus on both bases, the floor plan payments would pass to the trustee. The trustee's point may be further clarified by pre-supposing that Stuart's lien was not for $71,000.00 but for $171,000.00 (the floor plan payments in the Registry of the District Court total $131,437.23). Would there be any question that the payments, in toto, would be subject to the Stuart lien or, for that matter, the lien of any creditor. Pursuant to the provisions of §70c of the Bankruptcy Act, subdivion (3), the trustee, as of the date when the bankruptcy petition is filed has the rights of a lien creditor and those rights, like Stuart's, attach to the floor plan payments as they accrue.

The Special Master was of the opinion that the payments were a "contingent gratuity". However, as stated in 25 New York Jurisprudence, Gifts §1, p. 143:

> A gift has been judicially defined as a voluntary transfer of property without consideration or compensation.

There was certainly consideration given by Simon in the floor plan agreement which, according to its preamble, states: ". . . in consideration of the mutual covenants contained. . ." and the provisions of paragraphs 2(a) and (b) of the agreement evidence consideration being given by Simon. As to the passage of a contingent gift, see Clowe v. Seavy, 208 N.Y. 496 (1913); In re Aldrich's Estate, 215 P. 2d 724 (Cal. 1950) and Horton v. Moore, 110 F.2d 189 (6th Cir. 1940)

to the effect that a contingent testamentary bequest passes to the trustee under §70a of the Bankruptcy Act.

CONCLUSION

THOSE PORTIONS OF THE JUDGMENT OF JULY 29, 1974 THAT GRANT STUART AND THIRD NATIONAL LIENS OR SECURITY INTERESTS IN THE RENEWAL COMMISSIONS AND THE FLOOR PLAN PAYMENTS AS AGAINST THE TRUSTEE AND THAT PORTION OF THE JUDGMENT THAT GRANTS SIMON FLOOR PLAN PAYMENT AFTER JANUARY 1, 1971, SHOULD BE VACATED AND REVERSED AND THE TRUSTEE RECEIVE JUDGMENT DIRECTING THE PAYMENT TO HIM OF THE RENEWAL COMMISSIONS AND THE FLOOR PLAN PAYMENTS

TABLE OF CASES, STATUTES AND AUTHORITIES

STATUTES PAGE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

v.

Lawrence E. Simon, et al.,

Defendants,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt,

Intervenor-Appellant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ROBERT B. SCHINDLER being duly sworn, deposes and says:

That on the 30 day of October, 1974 deponent served appellant's brief, addendum and appendix upon the attorneys specified on the annexed sheet at the addresses therein specified by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal service within the State of New York.

Robert B. Schindler

Sworn to before me this
30 day of October, 1974

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